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THE INTEREST OF A LIFE TENANT IN MINERAL LANDS.

In the August number of this journal (page 264) the case of *Bond* v. *Godsey* was reported and commented upon. It involved generally the interest of a life tenant in mines underlying, and timber upon, the lands held by him. A phase of the question, and one of especial interest to the bar of the oil-producing counties of West Virginia, is the respective rights of a life tenant and a remainderman in a producing oil or gas lease, and, incidentally, the law of waste. Petroleum and natural gas, however, are only "minerals" (though formally distinguished by certain authorities as *ferœ naturœ*), and the doctrines hereinafter stated would seem to be just as applicable to minerals generally, in certain of which both Virginia and West Virginia abound.

A nice question in the law of mines and mining, and one not to be decided without careful examination of the facts of each case as well as of the law, is, *To whom should the yield during a life estate in an oil or gas well go?* To the life tenant absolutely, claiming the right to all that he can make the territory produce by his activity and enterprise, or should the yield be impounded and only the *interest upon it* be paid him, while the corpus is preserved for the remainderman? These questions easily suggest others, such as, If the life tenant refuse to develop the territory, oil and gas being, as above stated, "fugacious" in their nature, may the remainderman compel development upon equitable terms, or must he stand by with folded hands until the life estate falls in, and then, it may be, find exhaustion where there was once abundance? The questions first stated, however, of themselves require a degree of detailed treatment which will necessitate the limiting of our present attention to them alone.

As is stated by Judge Keith in *Bond* v. *Godsey* (*supra*), and in the editorial note appended, the common law is explicit that a life tenant has no interest in and no right to open and work *unopened* mines, though he may (1) open new shafts in old veins, or (2) sink new shafts into the same veins, or (3) *may open and dig into a new seam under-*

lying the first—thus depriving the original doctrine of much of its apparent scope and sternness, and opening the door for at times perplexing questions of fact, however uniform the law may be.

Before the discovery of petroleum, the Supreme Court of Pennsylvania held,[1] the question of coal mines being involved, that if mines are already opened, or if leased and the lease permits their being opened, it is not waste to work them, even to exhaustion.[2]

In *Eley's Appeal*[3] a testator had devised a portion of an estate to the children of B at his death, the *interest or income* arising therefrom to be paid to B during his life. The executors, under authority of the will, made a perpetual lease of all the coal in certain of testator's land. *Held*, that the rents were "income" and payable absolutely to B.

McClintock v. *Dana*[4] goes a step further. Testatrix devised her residuary estate to her executor to apply so much of the "yearly proceeds or income" thereof as should be necessary for the support of her daughter, the balance to be invested during her minority; upon attaining her majority the entire income was to be paid her during her life, and after her death the corpus of the estate was to go to her children. The executors, in pursuance of powers granted, leased certain coal land, *unopened at testatrix's death*, to lessees, who were empowered to mine the coal until it was exhausted, paying therefor a certain royalty or rent. *Held*, the whole of the rent or royalty was payable to the daughter as "income."[5]

There is nothing startling about most of the foregoing decisions—there is nothing to take them out of the well-known "long line of cases" recognizing a familiar doctrine. They are but applications of well-settled principles, and would not perhaps justify notice here but for the ruling in *Blakley* v. *Marshall*.[6] In that case, by deed of November, 1890, Andrew Blakley conveyed to Isaac Blakley and Louisa,

[1] Kier *v.* Peterson, 41 Pa. 361.

[2] Citing Findlay *v.* Smith, 6 Munf. 134. To the same effect are Neel *v.* Neel, 19 Pa. 352; Irwin *v.* Covode, 24 Pa. 162; and Westmoreland Coal Co.'s Appeal, 85 Pa. 344.

[3] 103 Pa. 303.

[4] 106 Pa. 386.

[5] Per Clark, J: "She (the testatrix) certainly never intended that her daughter should receive *merely the interest upon the instalments* representing the actual annual profit or yield of the mines; if she was entitled to participate upon mere profits or yield, she was entitled to these wholly; if in the sole value of the coal, then she was entitled to the interest only." Mr. Chief-Justice Mercur dissented, on the ground that the mine was not opened. Similar decisions were made in Wentz's Appeal, *Id.* 301; in Shoemaker's Appeal, *Id.* 392; in Raynolds *v.* Hanna, 55 Fed. 783, and in Woodburn's Estate, 138 Pa. 606.

[6] 174 Pa. 425.

his wife, a life estate in a tract of land, with remainder in fee to their children, and appointed said life tenants trustees for their children: *habendum*—"to them, the said Isaac and Louisa, for and during their life, and no longer, and as trustees and in trust for their said children, their heirs and assigns forever, subject to the life estate of said Isaac and Louisa, and in case of the death of Isaac, his wife shall only be trustee and have control of the property so long as she remains his widow."

In 1894, Isaac and Louisa Blakley, in their own right and as trustees for those in remainder, leased the property for the purpose of operating for oil and gas for fifteen years, upon the usual terms. The operations developed oil in paying quantities, and a case was stated to determine the ownership of the royalties—the life tenants being the plaintiffs, and a trustee appointed by the court to receive the royalties and pay them and the interest upon them to the proper parties, the defendant. It was held that the life tenants were entitled *only to the interest on the rents or royalties reserved* in the lease, and at their death that the corpus of the fund, made up of the aggregate of the royalties, should go to the remaindermen.

To illustrate: A lease is made of lands, not *by* a life tenant—for in *Marshall* v. *Mellon*[1] it is held that a life tenant can give no such right where operations have not been commenced before the life estate has accrued—but by a life tenant and a remainderman *sui juris*. The lease is to Z in consideration of his undertaking to develop the oil beneath the land, paying a royalty of one-eighth of all that may be found. The lease yields oil to the extent of $8,000 per month, and the life tenant demands of the lessees $1,000 per month, but is met with the answer that under *Blakley* v. *Marshall*[2] he is entitled to only sixty dollars per month on every thousand dollars yielded by the wells, the principal of which he will impound for the benefit of the remainderman, whoever he may be at the end of the life estate, howsoever long; though, he adds, had the wells been opened, or even under *Koen* v. *Bartlett*[3] had they been lawfully *leased to be opened*, he would have complied with the life tenant's demand in full and would have paid him the $1,000 monthly until the wells were exhausted, if the life estate continued so long.

The case was of first impression, and is a sufficiently novel application of the rule to call for the material portions of the opinion of the

[1] 179 Pa. 371. [2] *Supra.* [3] *Infra.*

court found in the foot-note.[1] No authority is cited except Stoughton's Appeal,[2] holding that oil in place is a mineral, and therefore part of the realty.

In *Wilson* v. *Youst*,[3] *Blakley* v. *Marshall* was approved in terms, the same court having ruled, as it states in its "syllabus by the court" in *Koen* v. *Bartlett*,[4] that—

"The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas *open when his life estate begins, or lawfully opened and worked* during the existence of such estate."

The expression "lawfully leased to be opened," found in the opinion, as stated below, is somewhat vague; but if it is to be strictly construed to mean that the authority to open new wells must be derived from a source other than the life tenant, or even than the life tenant *and* the remainderman, or his legal representative (in the absence of other stipulations) this statement of the law would seem technically correct, for, as we have seen, under *Blakley* v. *Marshall*, a lease by both of these interests will justify the lessee in paying to the life tenant only the interest on the rent or royalty.

In the course of the opinion in *Koen* v. *Bartlett*,[5] however, the West Virginia court lays down a proposition the importance of which demands a place in its syllabus, namely, that "*a mine lawfully leased*

[1] Sterrett, C. J: "In support of the plaintiff's claim to the whole of the royalty, much stress was laid upon the doctrine of waste, but we fail to see that it had any application whatever to the facts of this case. It is conceded that the oil was produced under the lease made by plaintiffs in their own right as life tenants and as trustees for those in remainder, and, as appears by the opinion of the court, their action as trustees for the remaindermen was with its sanction and approval. It is difficult to see upon what principle the *cestui que trust* should be excluded from participation in the royalty that accrued during the existence of the life estate. Assuming, for the sake of illustration, that they had been of full age and *sui juris*, instead of being parties through their trustees to an oil lease, they and the tenants for life had united in a conveyance in fee of part of the land. Could it, in the absence of any agreement on the subject, be successfully claimed that the life tenants were entitled to the purchase money? We think not. There is no difference in principle between the cases. . . . If there be life tenants and remaindermen, the former are entitled to the *enjoyment of the fund* (*i. e.*, interest thereon) during life, and at the death of the survivors the corpus of the fund should go to the remaindermen. This is as nearly a just and equitable a distribution as can be made. . . . It was obviously necessary, as well to the interest of both the tenants for life and the remaindermen, that they should thus unite in the lease, because no practical oil operator would undertake the development of supposed oil territory on the faith of a lease from life tenants only, and for the further and more important reason that, if not promptly developed and worked, the land would soon have been drained of its oil through wells on adjoining farms."

[2] 88 Pa. 201.

[3] (W. Va.) 28 S. E. 781.

[4] 41 W. Va. 556, 23 S. E. 664.

[5] *Supra.*

to be opened is an open mine within the meaning of the rule." This is going rather far, if intended to be taken without qualification. And whatever merit there is in the common law rule and in that of *Blakley* v. *Marshall* and *Wilson* v. *Youst*,[1] is seriously imperilled by the temptation held out to a life tenant to forge a lease by a prior but now deceased owner of the fee (under which, let it be understood, operations need not have been even commenced), and thus and thus alone, as by a magician's touch, convert his estate from a six per cent. per annum interest upon the yield or the royalty thereupon into a clear title to *the entire yield or royalty*, as the case may be. In the princely revenues derivable from a paying mine of any sort, it is not a wise jurisprudence, in our opinion, which affords such a temptation to those who would make haste to be rich.

That qualification should be in the direction of requiring the lease, if the mine has *not* been opened, to be of recent date, and the burden of proving its due execution and its *bona*, if not *uberrima*, *fides* to be placed upon the life tenant. If the question be asked, what is meant by "recent," we reply that it will largely depend upon the facts of each case, but that in no event should the lease be tainted with even a suggestion of abandonment and forfeiture through non-user, out of which have arisen some of the most desperately litigated cases in mining law.[2]

[1] Both *supra*.

[2] Venture Oil Co. *v.* Fretts, 152 Pa. 451; Duffield *v.* Hue, 129 Pa. 94; McNish *v.* Stone, 152 Pa. 457 (reported in foot-note); Crawford *v.* Ritchie (W. Va.), 27 S. E. 220, and Elk Fork Oil and Gas Co. *v.* Jennings, 84 Fed. 839, affirmed upon appeal.

Koen *v.* Bartlett was affirmed in Alderson *v.* Alderson, 33 S. E. 228, the ruling being that where a wife is seized of an estate of inheritance in lands and executes a mineral lease of same, her husband is entitled to an estate by the curtesy in the royalties arising from the lease, though no mine has been opened at the time of her death. The court goes into the question more fully than in Koen *v.* Bartlett, citing Kier *v.* Peterson, *supra*, where it was said "if the mines are already opened, or if the lease permits their being opened, it is not waste for the tenant to work them, even to exhaustion. Nor would it be waste to open new shafts or pits to follow the same vein." Also Eley's Appeal, 103 Pa. 300, where it was held that a power given executors to lease or sell the coal underlying a tract of testator's land, with the consent of six-tenths of the owners, gave the life tenants the same rights over unopened mines that they would have had if the mines had been opened and operated in testator's life-time. In Trees *v.* Eclipse Oil Co., 34 S. E. 933, the West Virginia court impliedly confines its previous ruling to an *executed* lease, for, while the case does not involve the particular point in Koen *v.* Bartlett, or Alderson *v.* Alderson, *supra*, yet the general proposition is laid down that an *executory* oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same and relieve themselves from the payment of any consideration therefor, is invalid to create *any other estate* than a mere optional right of entry, subject to termination at the will of either party. If this distinction is sound, the great importance to a life tenant of the existence of an executed lease, though not one step may

One of the considerations which might have influenced the court upon the point is the doctrine that equity regards that as done which ought to be or has been agreed to be done. But if we understand correctly the genius of this doctrine, it is its applicability in such cases as this to *the parties to the contract alone*, not to third persons who are entire strangers to it, and whose rights, it may be, have accrued without notice, actual or constructive, of it. "Equity will not exercise this power when it will injure third persons," says Mr. Justice Bradley,[1] "who have incurred detriment and acquired consequent rights by the acts that are done."

The Supreme Court of Pennsylvania blazed the way in the difficult field of the jurisprudence of petroleum, and the Supreme Court of Appeals of West Virginia has ably followed in the adjudication of novel phases from the same fertile field. It is but common justice to these dispensers of justice to say that no one can examine their work upon these subjects as a whole without being convinced that rich and poor have stood alike before them, and that their effort has been to give judgment according to the very right of the respective causes. In the peculiar circumstances of *Koen* v. *Bartlett*, justice was unquestionably done. Our only fear is that the court stated too broadly a doctrine which, without proper limitations, is susceptible of great abuse.

In *Marshall* v. *Mellon*,[2] the court suggests the advisability of legislation upon the general subject of the respective rights of the life tenant and the remainderman as follows:

"It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or nearby lands, in order to preserve the interests of both life-tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end."

This point is suggested in the second paragraph of this paper, and

ever have been taken towards the development of the mineral, will be readily perceived.

It should be noted, however, that in Kier *v.* Peterson the Supreme Court of Pennsylvania did not have this point presented in the record. There the life tenants were such by reason of a lease made *to them by the owner of the fee*, and it was upon *that* state of facts that the court used the language quoted *supra*—the only possible conclusion. Had the court intended its language to apply to the rights of a life tenant executed before the life estate began, it would have been *obiter*. So in Eley's Appeal, *supra*, the question arose only upon the construction of a lease under the will of the testator, and did not in any way involve a lease executed before the life estate began.

[1] In Casey *v.* Cavaroc, 96 U. S. 492

[2] *Supra.*

certainly demands the attention of the legislator. It might be urged that the flexible powers of a court of equity are already adequate for the purpose, but the Supreme Court of Pennsylvania has ruled otherwise.

Upon the question of remedies, it must suffice here to say that the general jurisdiction of equity is recognized by the leading cases. "A court of equity, with its power to enjoin waste, appoint receivers and managers, take accounts, etc., is the forum peculiarly appropriate for the remaindermen in such cases." [1] And a most notable case is that of *Johnston* v. *Price*,[2] in which there was a bill in equity for a discovery and an account between tenants in common of an oil and gas lease. One of the six important principles endorsed by the court was that the jurisdiction of a court of equity does not depend upon the *want* of a common law remedy, but may be sustained upon the ground that it is the *most convenient.*

Objections to the enlargement of equitable jurisdiction in the class of cases which we have considered cannot be sustained by any one possessing a practical knowledge of the nature of the subject-matter of such controversies, or indeed in any controversy between tenants in common of mineral lands or life tenants and remaindermen. We know of no stronger statement of the claims for the recognition of the forum of equity than that contained in the opinion of Clark, J., in *R. R. Co.* v. *McConnell:* [4]

"I return now to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, *would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy.* It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force,

[1] Williamson *v.* Jones, 43 W. Va. 562; 25 L. R. A. 222.

[2] 172 Pa. 427.

[3] By Act of June 5, 1883 (P. L. p. 79, Pepper & Lewis' Digest, p. 3346), the legislature of Pennsylvania has made the following provision: "Whenever petroleum shall be produced from land in controversy *in any action of ejectment* hereafter commenced, the court . . . or a law judge thereof . . . may direct a writ of estrepement to issue against the defendant . . . to prevent the further production of petroleum from the said land." When the land contains producing wells, a temporary receiver may be appointed, unless defendant gives bond to indemnify plaintiff. Natural gas is not mentioned in the Act.

[4] 82 Fed. 76.

although it is still maintained in form. It has been in answer to this that the great chancellors have stated time and time again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy—by what would be manifestly just in view of all the existing conditions—and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone in placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization."

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THE WINDING UP OF INSOLVENT BUILDING AND LOAN ASSOCIATIONS.

The fact that almost all of the building and loan associations incorporated and doing business under the laws of the State of Virginia, as well as a large number of those chartered and domiciled elsewhere, but doing business here, are now in liquidation, and that few or none of the principal questions that arise under these conditions have been decided in our Supreme Court, has suggested the idea that a few comments on this subject would not be untimely, and might be of some interest to the bar. The subject is a broad one and infinite in detail, therefore only the principal propositions involved can be noticed.

Building and loan associations exist and carry on their operations in this State only by virtue of legislative authority. The first statute authorizing their creation was that of May 29, 1852. This Act was repealed May 1, 1888. In the case of *Crabtree* v. *Old Dominion B. & L. Association*,[1] it was decided that "the Act of 1852, authorizing the voluntary incorporation of building and loan associations, upon the terms prescribed thereby, was an act of general nature and was repealed by section 4202 of the Code"; and further, that "an association organized under the general incorporation act[2] cannot vouch its charter to justify or excuse any violation of the law upon the subject

[1] 95 Va. 671; 4 Va. Law Reg. 12.

[2] Section 1145 of the Code.